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**IN THE  
COURT OF APPEALS OF INDIANA**

DWAYNE RHOINEY,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0602-CR-119

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Charles Wiles, Judge  
Cause No. 49G03-0410-MR-182728

**December 8, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Dwayne Rhoiney appeals his conviction of murder. He argues his conviction should be reduced to the lesser-included offense of reckless homicide because the State failed to prove he intentionally shot the victim, Gary Wemer.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On the evening of September 18, 2004, Rhoiney and an unidentified companion drove to Wemer's house where Wemer and his cousin Charles Cook were unloading plywood. Cook, Rhoiney, and Rhoiney's companion got into an argument over money Rhoiney believed Cook had stolen some months earlier. Rhoiney threatened to kill Cook. Rhoiney's companion had a gun. Rhoiney threatened to kill Cook's girlfriend Victoria Newland, and then Rhoiney and his companion left.

Cook called Newland to warn her and tell her Wemer's girlfriend, Alisha Walton, was coming to pick her up. When Walton started to drive away from Wemer's house, she saw Rhoiney walking toward the house with a gun. Because her child was in the house, Walton flashed her headlights at Rhoiney to attract his attention. He walked over to her vehicle, pointed a gun at her, and threatened her. She told him Cook had returned to his own house and he left. Walton then went back inside and told Cook and Wemer that Rhoiney was on his way to Cook and Newland's house. The men left for Newland's house in separate vehicles and by separate routes.

Newland was on the porch when Wemer arrived. Wemer got out of the car and told Newland to get in because he was taking her back to his house. Rhoiney and his companion pulled up as Newland reached Wemer's vehicle. Rhoiney got out of the car

with a gun and asked Wemer if he knew where the money was. Wemer said he did not. Rhoiney told Wemer to stop or he would shoot. Wemer stopped. Wemer and Rhoiney were face-to-face and about five or six feet apart. Newland testified:

Some lights came up the road, and [Rhoiney] looked at Gary Wemer, and the trigger went off on the gun. And then he got in the car. After he shot Gary, he turned around and looked at me and acted kind of frantic, got in the car and rushed off.

(Tr. at 325.) Cook arrived as Rhoiney sped off. Wemer later died of a gunshot wound to the stomach. Newland identified Rhoiney as the person who shot Wemer.

Rhoiney was charged with murder,<sup>1</sup> criminal confinement as a Class B felony,<sup>2</sup> and carrying a handgun without a license, a Class A misdemeanor.<sup>3</sup> The jury found him guilty of all charges and the trial court sentenced him to combined term of 65 years.

### **DISCUSSION AND DECISION**

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict and without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind. Ct. App. 2003).

“A person who . . . knowingly or intentionally kills another human being . . . commits murder, a felony.” Ind. Code § 35-42-1-1. “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.”

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<sup>1</sup> Ind. Code § 35-42-1-1.

<sup>2</sup> Ind. Code § 35-42-3-3. Rhoiney does not appeal this conviction.

<sup>3</sup> Ind. Code § 35-47-2-1. Rhoiney does not appeal this conviction.

Ind. Code § 35-41-2-2(a). “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Ind. Code § 35-41-2-2(b). Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm. *Jones v. State*, 536 N.E.2d 267, 270 (Ind. 1989), *reh’g denied*.

Rhoiney argues “the shooting was most likely the result of an accident,” (Br. of the Appellant at 7-8), and therefore his conviction should be reduced to the lesser-included offense of reckless homicide.<sup>4</sup> He asserts Newland’s testimony that “the trigger went off on the gun,” (Tr. at 325), “suggests Rhoiney was holding the gun, it accidentally went off and he panicked.” (Br. of the Appellant at 8.) We decline Rhoiney’s invitation to reweigh the evidence.

Rhoiney threatened to kill Cook. He told Cook he was going to kill Newland, and he held a gun to Walton’s head. He pointed a gun at Wemer and threatened to shoot if Wemer did not stop. Wemer stopped, but Rhoiney shot him in the stomach from about six feet away.

The jury could have reasonably concluded Rhoiney intended to kill Wemer when he pointed a gun at him, threatened to shoot him, then shot him in the stomach from close range. *See Jones*, 536 N.E.2d at 270. The evidence was sufficient to sustain the conviction. Accordingly, we affirm.

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<sup>4</sup> “A person who recklessly kills another human being commits reckless homicide.” Ind. Code § 35-42-1-5. “A person engages in conduct ‘recklessly’ if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.” Ind. Code § 35-41-2-2(c).

Affirmed.

BAILEY, J., and RILEY, J., concur.